

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT CASSIERI	:	ORDER
	:	DTA NO. 817576
for Revision of a Determination or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Quarters Ended November 30, 1978,	:	
August 31, 1979, November 30, 1979 and February	:	
28, 1980.	:	

Petitioner, Robert Cassieri, 268 Kelly Boulevard, Staten Island, New York 10308, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the quarters ended November 30, 1978, August 31, 1979, November 30, 1979 and February 28, 1980.

The Division of Taxation ("Division"), by its representative, Barbara G. Billet, Esq., (Andrew S. Haber, Esq., of counsel) filed a motion dated January 7, 2002 for an order dismissing the petition or granting summary determination and denying the petition. Petitioner, Robert Cassieri, represented by Anthony J. Tucci, Esq., filed reply papers dated February 4, 2002 to the motion. Based upon the motion papers, the affidavits and documents filed therewith, and the pleadings¹ in this matter, Frank W. Barrie, Administrative Law Judge, renders the following order.

¹ The Division failed to include in its motion papers a copy of the pleadings in this matter, as required by 20 NYCRR 3000.9(b). Nonetheless, Mr. Cassieri's petition dated February 22, 2000 and the Division's answer dated April 27, 2000 have been considered in rendering this order.

FINDINGS OF FACT

1. Petitioner, Robert Cassieri, filed a petition which he signed and dated February 22, 2000. In his petition, he contested his personal liability for sales and use taxes, plus penalty and interest, asserted due against him as an officer of Rosavin Ltd., which operated a Manhattan restaurant at 225 E. 58th Street, known as the Katja Restaurant, for the following sales tax quarters:

Sales Tax Quarter Ended	Sales Tax Asserted Due	Penalty	Interest
November 30, 1978	\$12,881.97	\$ 3,381.51	\$ 108,133.75
August 31, 1979	5,754.77	1,953.44	53,324.98
November 30, 1979	10,596.72	2,781.57	81,435.37
February 28, 1980	12,024.07	3,337.43	95,384.44
Total	\$41,257.53	\$11,453.95	\$ 338,278.54

2. Petitioner asserted that the Division improperly filed a tax warrant against him for the above amounts because it “never issued . . . a Notice of Determination of sales taxes due for any of these periods.” Further, petitioner asserted that he was not a person required to collect tax for Rosavin Ltd. and was under no duty to act for this corporation.

3. The Division in its answer dated April 27, 2000 gave a confusing response to the petition of Mr. Cassieri. First, it denied the assertion in the petition that it never issued a Notice of Determination of sales taxes due for the periods at issue.² The Division then pleaded further that it “issued a Notice and Demand dated March 11, 1981” against petitioner asserting the

² The Division’s denial that it never issued a Notice of Determination equates to an assertion that it did issue a Notice of Determination.

amounts at issue “based on the returns filed by the corporation without payment of the tax reported as due.”

4. In its motion papers, the Division contended that “It is undisputed that the Notice and Demand was issued prior to April 17, 1985.” However, this contention was challenged by the affidavit of petitioner’s attorney dated February 4, 2002 which stated that “The Petitioner never received a copy of the Notice and Demand and the copy attached to the Division’s motion papers is the first instance that petitioner had to review the purported notice.” The Division introduced no proof of any sort concerning the preparation, issuance and mailing of the Notice and Demand dated March 11, 1981.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted,

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Summary determination is a drastic remedy and should not be granted if there is any doubt as to the existence of a triable issue (*see, State Bank of Albany v. McAuliffe*, 97 AD2d 607, 467 NYS2d 944, *appeal dismissed* 61 NY2d 758).

B. The Division has also termed its motion as one “for an order dismissing the petition, with prejudice” A petition may be dismissed on the grounds that “the division of tax appeals lacks jurisdiction of the subject matter of the petition” (20 NYCRR 3000.9[a][1][ii]). In order to determine whether the petition of Mr. Cassieri should either be dismissed or summary determination granted in favor of the Division, the same question must be addressed: whether the Division of Tax Appeals has jurisdiction over the Notice and Demand dated March 11, 1981.

C. Under the current law at Tax Law § 1138(a)(3)(B), the Division of Tax Appeals would have jurisdiction over petitioner's request for review of the Division's assertion of sales and use tax against him as a corporate officer required to collect tax on behalf of Rosavin Ltd. since the Division would have been required to issue a notice of *determination* of sales and use taxes due in order to proceed against petitioner as an officer. However, prior to the effective date of April 17, 1985 for the current law, Tax Law former § 1138(a)(3)(B) did not provide the Division with the power to proceed administratively against the taxpayer through the issuance of a notice of determination (*see, Matter of Sergold*, Tax Appeals Tribunal, May 23, 1991 [wherein the Tribunal, citing *Matter of Parsons v. State Tax Commn.*, 34 NY2d 190, 356 NYS2d 593, and *Matter of Hall v. New York State Tax Commn.*, 108 AD2d 488, 489 NYS2d 787, concluded that the Division properly proceeded by the issuance of a notice and *demand* for payment of sales and use taxes due which was unreviewable by the Division of Tax Appeals). The Tribunal in *Sergold*, citing its earlier decision in *Matter of Stern* (September 1, 1988), noted that "the amendment to Tax Law § 1138(a) [effective April 17, 1985] had no effect with regard to notices issued *prior* to the effective date of the amendment." (Emphasis added.)

D. Consequently, since the Division on its motion has not offered any proof to establish that the Notice and Demand dated March 11, 1981 was, in fact, issued prior to April 17, 1985, there is an insufficient basis to direct an accelerated determination in the Division's favor. In addition, as noted in footnote "2", the Division has not even clearly pleaded that a Notice of Determination was not issued in this matter, which would further impede granting the relief it seeks. Finally, given this analysis, it is not necessary to address the knotty question, which was not discussed by either party, whether the Appellate Division's decision in *Meyers v. Tax*

Appeals Tribunal (201 AD2d 185, 615 NYS2d 90, *lv denied* 84 NY2d 810, 621 NYS2d 519) *sub silentio* reversed or modified its earlier decisions in *Parsons (supra)* and *Hall (supra)*.

E. This matter will be set down for hearing on April 24, 2002, as previously agreed by the parties as noted in the Division's letter dated December 12, 2001, and a Notice of Hearing will be issued in due course.

DATED: Troy, New York
March 14, 2002

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE